United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

F 115

No. 21,380

HOWARD DONALD S. WASHINGTON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court
for the District of Columbia

Robert C. Handwerk
Southern Building
Washington, D.C. 20005
Counsel for Appellant
Appointed by the Court

QUESTIONS PRESENTED

1. Was appellant arrested for selling a narcotic drug (heroin)?

2. Was there any proof offered at the trial that appellant sold heroin?

3. Was appellant arrested and illegally charged with being in possession of heroin?

4. Was appellant, a known addict, charged and convicted for possession of heroin for his own use?

5. Did the Government prove beyond a reasonable doubt that appellant knew the narcotics had been imported?

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,380

HOWARD DONALD S. WASHINGTON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

A. Statement of the Proceedings:

1. Appellant was indicted on two counts, the first charged that on or about June 7, 1966, he purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, heroin.

The second count charged that at the same time he facilitated the concealment and sale of a narcotic drug, that is, heroin, after said heroin had been imported into the United States, contrary to law, with the knowledge of Howard D.S. Washington.

2. On December 30, 1966, appellant had a hearing in the court below on his motion to suppress certain evidence at which testimony was taken and the motion denied. Later the case was tried in the court below without a jury and appellant found guilty on both counts of the indictment.

3. Appellant was sentenced 20 months to 5 years on Count 1, and 5 years on Count 2, said sentences by the counts to run concurrently with each other and concurrently with the sentence now being served in Criminal Case No. 995-66. That Case was appealed to this Court and bears No. 21,105, which has

been argued before the Court and is now awaiting a decision.

B. Statement of the Facts

1. On June 7, 1966, Officer Hankins testified that by the aid of binoculars he observed one Joe Nell give appellant money which had been given to Nell by one Margaret Smith, and that the defendant below then gave Nell something in a white tissue paper. Tr. 16,23 (motion to suppress). This was denied by appellant. Tr. 11 (motion to suppress). That by tests it was later determined the contents were heroin and appellant was arrested about one hour and a half later. That after search of defendant, more heroin was taken fro his person without tax stamps on the package. There were no markings on the package indicating that the substance therein had been imported.

STATUTES INVOLVED

Title 26, § 4704(a), United States Code (1964 Ed.).

Title 21, § 174, United States Code (1964 Ed.).

SUMMARY OF ARGUMENT

I. The motion to suppress evidence should have been granted.

II. No evidence introduced by appellee that appellant knew narcotics had been imported.

ARGUMENT

I

The court erred in denying appellant's motion to suppress evidence.

Appellant testified at the hearing on the motion to suppress that he gave Nell nothing and Nell did not give him any money. Tr. 11 (motion to suppress). However, Detective Hankins testified to an exchange between the two which he saw through binoculars. This observation was not sufficient probable cause for the later arrest of appellant, as held in Perry v. United States, 119 U.S. App. D.C. 360, 336 F. 2d 749 (1964). After the observation, Nell was not arrested, nor was appellant arrested until after he had left the location about an hour and a half later. There was no proof that appellant made a sale of heroin; the price paid therefor; nor was the alleged sale price (money) found on defendant at the time of his arrest. It was later shown that the article exchanged was subsequently found in the possession of one Margaret Smith who was arrested. There was a time lapse, such as referred to in the holding in Wong Sun v. United States, 371 U.S. 471 (1963).

II.

No evidence offered by appellee that appellant knew the narcotics had been imported.

Defendant below testified as to his knowledge of importation, Tr. 71-73, incl. (Trial Testimony). Appellant's testimony was not found incredible, nor impeached. There was a reasonable doubt as to such knowledge.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the lower court should be reversed and the commitment set aside.

Respectfully submitted,

Robert C. Handwerk
Southern Building
Washington, D.C. 20005
Counsel for Appellant
Appointed by the Court

CERTIFICATE OF SERVICE

I hereby certify that a copy of Brief for Appellant was on the 14 day of March, 1966, mailed postage prepaid, to the U.S. Attorney, U.S. Court House, Washington, D.C. 20001, Attorney for Appellee.

Robert C. Handwerk

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 21,380

HOWARD D. S. WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
GEOFFREY M. ALPRIN,
DANIEL HARRIS,
Assistant United States Attorneys.

Cr. No. 921-66

QUESTION PRESENTED

In the opinion of appellee the following question is presented:

Whether there was probable cause for appellant's arrest for a narcotics violation where a detective with three years experience on the Narcotics Squad observed in a part of the District notorious for narcotics traffic one Smith, known to the detective as having a criminal record, give money in bills to one Nell, known to the detective as a narcotics law violator, who in turn gave the money to appellant who in exchange gave Nell something wrapped in small tissue which Nell gave to Smith who put it in her blouse and where, following Smith's apprehension, it was learned that Smith had in her possession four capsules of heroin wrapped in tissue paper.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,380

HOWARD D. S. WASHINGTON, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment the appellant was charged with violating 26 U.S.C. § 4704(a) and 21 U.S.C. § 174. By motion to suppress appellant asserted his arrest and subsequent search was illegal. On December 30, 1967, appellant's motion to suppress was heard and denied by Judge Matthews. At trial before Judge Bryant appellant again raised the legality of his arrest and subsequent search. Without taking testimony, Judge Bryant heard argument and denied appellant's motion to suppress and after trial found appellant guilty on both counts. On

September 22, 1965, Judge Bryant sentenced appellant to twenty months to five years on count one and five years on count two, the sentences to run concurrently.[1]

Circumstances Surrounding The Procurement of Evidence

On June 6, 1967, Detective Louis T. Hankins and Carl W. Brooks were assigned to the Narcotic Squad of the Metropolitan Police Department of the District of Columbia. At that time Detective Hankins had been assigned to the Narcotic Squad for three years. (M. Tr. 14.)[2] On that day at about 4:15 P.M., he was on Florida Avenue observing Wiltberger and T Streets in the vicinity of the Howard Theater with the use of binoculars (Tr. 15-16).[3] Detective Hankins saw Margaret Smith, known to him,[4] come to the corner of Wiltberger and T in a white convertible. He observed her get out of the car, walk over to Joe Nell, also known to the Detective,[5] and watched Smith give money in bills to Nell (M. Tr. 15; Tr. 16). Smith then went into Cecelia's Restaurant, while Nell walked across the street to where appellant was standing.[6] Nell gave appellant the same money which Smith had given him and which he had held in his hand the entire time.

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[1] The sentences in this case are running concurrently with a sentence imposed upon appellant of 5 years on count one and 10 years on count two upon his conviction for violating the same statutes in Criminal Number 995-66. A separate appeal is pending in that case. *Washington* v. *United States,* No. 21,105.

[2] "M. Tr." refers to the transcript of the hearing on appellant's motion to suppress before Judge Matthews.

[3] "Tr." refers to the transcript of appellant's trial on August 22 and 23, 1966.

[4] Detective Hankins had arrested Margaret Smith and knew her to be convicted of petit larceny, disorderly and other things (M. Tr. 21-22). It is not clear if he knew her as a user of narcotics or as having been convicted of violating narcotics laws (M. Tr. 15, 22).

[5] Detective Hankins had known Joe Nell for a number of years, and had arrested him and knew he had three or four narcotic convictions.

[6] Appellant was then unknown to Detective Hankins (Tr. 17).

Appellant reached into his pocket and in exchange gave Nell something in a small tissue paper (M. Tr. 16; Tr. 17). Nell then left appellant and walked to the front of Cecelia's where he gave Smith the same tissue paper (M. Tr. 16; Tr. 18). Smith put it into her blouse (M. Tr. 17; Tr. 18) and got back into the car and left while appellant walked east on T and out of sight (Tr. 18). Detective Hankins, in contact with Detective Brooks by radio, informed him of what he saw (M. Tr. 17; Tr. 18). Detective Brooks arrested Smith at about 4:15 or 4:30 P.M. the same day and found her in possession of a piece of white tissue paper containing four capsules of heroin (M. Tr. 17; Tr. 55). Smith stated she had gotten them from Nell (M. Tr. 31). Detective Brooks field tested one capsule and obtained positive results which indicated it contained an opium derivative (Tr. 56). Detective Brooks forwarded the information learned as a result of Smith's arrest, including the test results, to Detective Hankins by radio (M. Tr. 17; Tr. 56). Detective Hankins left his place of observation, the second floor of a private home at about 5:15 or 5:30 P.M. and, as he turned to walk up 6th Street, he met appellant and arrested him (M. Tr. 17-19; Tr. 18). He informed appellant that he was under arrest for violation of the Harrison Narcotic Act. He partially searched appellant and found two capsules in a Kool cigarette container (M. Tr. 18; Tr. 23). He also observed a small plastic bag, which contained heroin, fall from appellant's pocket (Tr. 19, 61). Appellant was then taken to the Narcotic Squad Office where Detective Hankins thoroughly searched appellant and discovered an envelope containing 134 capsules of heroin (M. Tr. 18; Tr. 24, 61.)

Appellant testified at the hearing on his motion to suppress before Judge Matthews. He agreed with Detective Hankins on the time and place of arrest, as well as to what Detective Hankins found on him at the place of arrest and later (M. Tr. 4-6, 11). He stated that he had been opposite the Howard Theater about an hour before his arrest, that Joe Nell came up to him as he was reading a paper but nothing transpired between them—Nell

neither gave him anything nor did he give Nell anything.[7] (M. Tr. 10.) He knew Margaret Smith from the street but he denied having seen her that afternoon (M. Tr. 12). He admitted that he had been convicted under the Harrison Narcotic Act before, in 1959 (M. Tr. 7).

Trial

Both Detective Hankins and Detective Brooks testified at trial for the Government. Detective Hankins related the circumstances of his observations of appellant Nell and Smith and the circumstances of his arrest and search of appellant (Tr. 14-54). Detective Brooks related the circumstances surrounding his arrest of Smith (Tr. 54-60).

The plastic bag containing heroin, the Kool cigarette pack with the two capsules of heroin found in it, and the envelope containing 134 capsules were identified and a chain of custody established (Tr. 19-25). Neither the items nor their wrappers contained tax stamps appropriate to the sale or transfer of narcotics (Tr. 21, 25). The testimony of the chemist, Mr. John A. Steel, who analyzed the contents and found the white powder and all 136 capsules to weigh 7,908 milligrams to be a mixture of heroin, quinine and milk sugar was stipulated to. (M. Tr. 61.) The narcotics were admitted into evidence over appellant's objection (Tr. 14, 61).

Appellant testified at trial as the sole defense witness. He admitted that the items in evidence came from him at the time of his arrest on June 7, 1966 (Tr. 66-67). But he maintained that there was nothing on them to indicate that they had been illegally imported (Tr. 68). He said James, last name unknown, from Detroit whom he had seen a couple of times had given them to him (Tr. 69). He testified that he did not know how many caps he had

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[7] Judge Matthews, after hearing both appellant and Detective Hankins, chose not to believe appellant and to accept the officer's version entirely. (M. Tr. 38-39.)

been given, as he had never counted them,[8] and that he had used some of the narcotics but had not sold any[9] (Tr. 70). Appellant further testified that he was aware that almost all, if not all, heroin is illegally imported into the United States (Tr. 71). And he admitted that he has been tried on charges of illegal importation of heroin before[10] (Tr. 73).

Appellant's position at the close of trial evidence was that assuming the motion to suppress was properly denied —it was twice denied—there was no question of his guilt on the charge of transacting from packages other than the original tax stamped package but that the Government failed to show appellant knew the narcotics had been illegally imported and therefore appellant's guilt under the charge of facilitation, concealment or sale was not supportable. The court rejected appellant's argument and found him guilty of both charges (Tr. 78).

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

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[8] The court found this incredible: ". . . you can't possibly think I could imagine that anybody in the world would give him 136 capsules for nothing, in the first place, and in the second place that anyone would receive a quantity like 136 capsules without counting them.

"So as to his credibility, applying the usual test of credibility of a witness, his story is inherently incredible. Somebody just walked up to somebody on a casual basis—he knew his name was James and had met him a couple of times before—and he just gave him an envelope containing 136 capsules of narcotics—that's incredible" (M. Tr. 76-77).

[9] The trial court found that appellant had sold narcotics (Tr. 80).

[10] The trial court knew that appellant had been convicted of narcotics violations (Tr. 78) although the trial record does not show that it was established. Possibly it was known from the motion to suppress proceedings before Judge Matthews (M. Tr. 7).

> any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts, in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
>
> * * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, United States Code, Section 4704(a), provides:

> It shall be unawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SUMMARY OF ARGUMENT

Appellant argues that there was insufficient information within the knowledge of the arresting officer to constitute probable cause to support his arrest. We think his argument is without merit.

Detective Hankins observed in a part of the District notorious for narcotics traffic one Smith, known to the Detective as having a criminal record, give money in bills to one Nell, known to the Detective as a narcotics law violator, who in turn gave the money to appellant and received in exchange from appellant something wrapped in

small tissue paper which Nell gave to Smith who, upon receiving it, put it in her blouse. A few minutes later Smith was apprehended by Detective Brooks who found that Smith had in her possession a piece of white tissue paper containing four capsules of heroin. Smith relayed this information to Detective Hankins who then arrested appellant. On these facts, we submit, Detective Hankins had more than ample information to support appellant's arrest.

ARGUMENT

The arrest of appellant was lawful because there were reasonable grounds to believe that appellant had just completed a sale of narcotics.

Appellant contends that the passing of money from Smith to Nell and then to himself and in return the passing of something in a tissue from himself to Nell and then to Smith, all of which was witnessed by the arresting officer, was innocuous. Appellant relies on *Perry* v. *United States*, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964) to support this contention. There an informer telephoned police that Perry, his wife and a cousin were selling narcotics near 14th and U Streets. Going there, the police saw, across a crowded street, that in walking twelve blocks, the three stopped several times to talk to people, including known addicts. "Twice an officer saw an 'exchange of something' with a known addict." *Ibid.* "When pressed, the officer said first that one exchange 'looked like money' and then that it was money. He did not remember whether . . . [Perry] took part in this exchange." 118 U.S. App. D.C. at 360, n.1, 336 F.2d at 748, n.1. Perry and companions were then arrested. This Court held:

> Seeing Perry "exchange . . . something" with a known addict, though not "totally innocuous" was not probable cause for Perry's arrest. 118 U.S. App. D.C. at 361, 336 F.2d at 749.

The Court remanded for further proceedings to determine the reliability of information to the police that defendant and others were selling narcotics since, *standing alone*, Perry's "exchange . . . [of] something with a known narcotic addict, though not 'totally innocuous' was not probable cause for Perry's arrest." *Perry* v. *United States*, 118 U.S. App. D.C. at 361, 336 F.2d at 749.

Here there was far more than the mere exchange of something with a known narcotic addict. Here Detective Hankins, an experienced narcotics squad officer, saw money and something small wrapped in tissue paper pass between appellant and Smith, a transaction he observed taking place through an intermediary who was known to the Detective as a convicted narcotics law violator. Furthermore, he witnessed the transaction in a part of the District notorious for its traffic in narcotics. See *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 356 n.1, 372 F.2d 928, 929 n.1 (1966). And he saw Smith, the buyer, put the package obtained from appellant in her blouse, a place where, so Detective Hankins could conclude, she wished to secrete it.

On the basis of this alone, we think Detective Hankins could have reasonably concluded that he witnessed an illegal sale of narcotics. As the Court said in *Bailey* v. *United States*, D.C. Cir. Nos. 20,623-25, 20,729, decided December 14, 1967 (Slip op. at 5-6):

> Probable cause is a plastic concept whose existence depends on the facts and circumstances of the particular case. It has been said that " '[t]he substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' " *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949). Much less evidence than is required to establish guilt is necessary. *Draper* v. *United States*, 358 U.S. 307, 311-312 (1959). The standard is that of "a reasonable, cautious and prudent police officer" and must be judged in the light of his experience and training. *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958). The

> police must have enough information to "warrant a man of reasonable caution in the belief" that a crime has been committed and that the person arrested has committed it. *Carroll* v. *United States*, 267 U.S. 132, 162 (1925). See also *Henry* v. *United States*, *supra*, 361 U.S. at 102. A finding of probable cause depends on the "practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." *Brinegar* v. *United States*, *supra*, 338 U.S. at 175.

And in *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962), the Court said:

> [P]robable cause is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest. The question to be answered is whether such an officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested.

Here of course Detective Hankins had more than his observation of the Smith-Nell-appellant transaction on which to base appellant's arrest. Following the transaction, Detective Brooks arrested Smith and found her in possession of a piece of white tissue paper, containing four capsules of heroin which Smith stated she had gotten from Nell.[11] Detective Brooks relayed this information to Detective Hankins who then arrested appellant.

Appellant argues that information from Smith was too unreliable to support probable cause. He relies on *Wong*

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[11] While we think Smith's arrest was based on probable cause, assuming that it was not, we find no bar to the use of information obtained as a result of Smith's arrest to support appellant's arrest. See *Tindle* v. *United States*, 117 U.S. App. D.C. 27, 325 F.2d 223 (1963), *cert. denied*, 379 U.S. 883 (1964); *Cf. Smith* v. *United States*, 117 U.S. App. D.C. 1, 324 F.2d 879 (1963); see also *Wong Sun* v. *United States*, 371 U.S. 471, 491-92 (1963); *Long* v. *United States*, 124 U.S. App. D.C. 14, 18, 360 F.2d 829, 833 (1966).

Sun v. *United States*, 371 U.S. 471 (1963). But *Wong Sun* holds that, standing alone, information given by a previously untried informant, himself under arrest for narcotics violation is not sufficient probable cause to support the arrest of another. Here, however, Detective Hankins used information obtained from Smith to corroborate his observations. In short, here the information obtained from a cohort was additional information about a known situation—not as in *Wong Sun* the sole basis for an arrest.

These facts, we submit, were more than ample to support appellant's arrest.

CONCLUSION

WHEREFORE, it is submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
GEOFFREY M. ALPRIN,
DANIEL HARRIS,
Assistant United States Attorneys.

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